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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-324

[redacted] CLASS OF COUNTY CLERKS and REGISTRARS OF VOTERS OF CALIFORNIA,

Petitioners,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and EDMUND G. BROWN JR., Secretary of State of the State of California,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

EVELLE J. YOUNGER
Attorney General of the
State of California

IVER E. SKJEIE,
Assistant Attorney General
of the State of California

GEORGE J. ROTH,
Deputy Attorney General
of the State of California
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-6221

Attorneys for Petitioners
The People of the State of
California, and the Class of
County Clerks and Registrars of
Voters of California

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THE PEOPLE OF THE STATE OF CALIFORNIA, and the CLASS OF COUNTY CLERKS and REGISTRARS OF VOTERS OF CALIFORNIA,

Petitioners,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and EDMUND G. BROWN JR., Secretary of State of the State of California,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Petitioners, The People of the State of California and the Class of County Clerks and Registrars of Voters of California, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in the proceedings on March 30, 1973.

Opinion Below

The opinion of the Supreme Court of the State of California in the case of *Ramirez* v. *Brown*, 9 Cal.3d 199, ---- P.2d ----, ---- Cal.Rptr. ---- (1973) is printed in the Appendix.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered in an original proceeding before that Court on March 30, 1973. This petition for certiorari was filed more than 90, but within 150 days thereafter, pursuant to an order extending time to and including August 27, 1973 granted by Mr. Justice Douglas on July 2, 1973. U.S. Sup. Ct. No. A-4. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Can a state constitutionally disenfranchise convicted felons who are otherwise qualified to vote?

   a. Does the denial of voting rights for "participation in rebellion, or other crime" language of the United States Constitution, Amendment XIV, Section 2, override the "equal protection" clause of Amendment XIV, Section 1, insofar as a state's right to disenfranchise convicted felons is concerned?

   b. May California deny the privileges of an elector to a person convicted of an infamous crime, embezzlement or misappropriation of public money, or exclude from suffrage persons convicted

of bribery, perjury, forgery, malfeasance in office, or other high crimes?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Section 2:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

California Constitution:

Article II, Section 3:

"The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this State."

Article XX, Section 11:

"Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

California Statute:

Elections Code section 350:

"If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

STATEMENT OF THE CASE

The California Constitution mandates the California Legislature to provide for disenfranchisement of persons convicted of embezzlement or misappropriation of public money, bribery, perjury, forgery,

malfeasance in office, infamous crimes, and high crimes until restoration of civil rights. The Legislature did so many years ago. Thus, for example, at the first session of the Legislature in 1850 a statute was enacted providing that "[n]o . . . person convicted of any infamous crime, shall be entitled to the privileges of an elector"; and "infamous crime" was defined as any crime ". . . which is punishable by death or by imprisonment in the state prison." Stats. 1850, ch. CXL, art. II, §§ 12, 14. Subsequently, after various statutory additions and changes, the California Supreme Court in *Otsuka* v. *Hite*, 64 Cal.2d 596 (1966), declared that not all felonies are infamous or high crimes and provided that each county clerk or registrar of voters should make the determination on a case-by-case basis considering various factors such as nature of the crime, length of time since commission, rehabilitation of the offender, etc. California Elections Code section 350 provides for superior court proceedings to contest and review the propriety of the decision of the election official.

Since the 1966 *Otsuka* decision, a discrepancy has arisen in various California counties with respect to what crimes, when taken by title alone, are sufficient to disenfranchise.

The instant matter before the Court for which a writ of certiorari is prayed, *Ramirez* v. *Brown*, 9 Cal.3d 199, ____ P.2d ____, ____ Cal.Rptr. ____ (1973), does not resolve such discrepancy but goes further than *Otsuka*. *Ramirez* declares that California Con-

stitution, article II, section 3, and article XX, section 11, and all statutes enacted thereunder which disenfranchise convicted felons whose terms of imprisonment and parole have been completed are unconstitutional *solely on the basis* of a denial or violation of the Equal Protection Clause of United States Constitution, Fourteenth Amendment, Section 1. The Supreme Court of California in *Ramirez* did not answer the questions raised by petitioners therein relating to unequal application by county clerks and registrars of voters of the right to the franchise because of ambiguity in meaning of the words "infamous" and "high" crimes. Rather, as indicated, it said that California's entire system of disenfranchisement of convicted felons was improper and unconstitutional under the Equal Protection Clause. This was the only ground for the Court's ruling below.

California Constitution, article II, section 3, provides:

> "*The Legislature shall prohibit improper practices that affect elections and shall provide that no* severely mentally deficient person, insane person, *person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money,* shall exercise the privileges of an elector in this State." (Emphasis added.)

Article XX, section 11, provides:

> "*Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes.* The

privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influences thereon from power, bribery, tumult or other improper practice."

In *Ramirez* v. *Brown, supra,* 9 Cal.3d 199 (1973), respondent Ramirez and other petitioners in the state court action below, invoked the original jurisdiction of the California Supreme Court. They sought in a class suit to force all county clerks and registrars of voters to permit them to register to vote even though each had previously been convicted of a felony. The California Supreme Court ruled that insofar as the California Constitution and statutes purported to disenfranchise any convicted felon who had completed his term of imprisonment and parole, *regardless of the offense,* such were unconstitutional as violative of the Equal Protection Clause of section one of the Fourteenth Amendment to the United States Constitution. No independent state constitutional or other ground was relied upon by the California Court.

The defendents in the California Supreme Court action were the Secretary of State of California, three named county clerks and registrars of voters as representative of a class, and the class of county clerks and registrars of voters of each California county. None of the latter class appeared in the action except for the County Clerk of Mendocino County.

The California Secretary of State was represented in the state court by the California Attorney General.

The position advanced on behalf of the Secretary of State was (a) that all felons currently in prison or on parole should be excluded from the suit; (b) that all felons convicted of Elections Code felonies should be denied the right to vote until pardoned by the Governor or until the right to vote was restored by the superior court after the hearing referred to above; (c) that the state court should clarify the voting status of all felons convicted of non-Elections Code violations which violated the sanctity or integrity of the elective process; (d) and that the state court should clarify the voting status of all other felons whose crimes did not violate the sanctity or integrity of the elective process.

In reaching its decision, the Supreme Court of California excluded from its holding all convicts during their incarceration in prison or on parole. That group of individuals is not a part of nor involved in this case.

The County Clerk of Mendocino County, Viola N. Richardson, has petitioned for certiorari from said decision of the Supreme Court of California. *Richardson* v. *Ramirez*, October Term, 1972, Docket No. 72-1589.

The Secretary of State of California has informed the Attorney General of California that he will oppose the Richardson petition for certiorari. Such attack is contrary to the position taken by the Secretary of State and the State of California in the lawsuit below, and leaves the People of the State of California without any representation in the matter. Therefore, to

prevent the People from losing their position by default and to uphold the validity of California Constitution and statutory provisions, the California Attorney General is forced to proceed with the case on behalf of the People of the State of California, the real party in interest herein.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. This Court Has Recently Twice Affirmed Without Opinion Cases Holding That a State May Constitutionally Disenfranchise Convicted Felons Who Are Otherwise Qualified to Vote.

Twice recently, this Court has had before it the issue of whether a state may constitutionally disenfranchise convicted felons who are otherwise qualified to vote. In each instance, the Court has affirmed without opinion lower court rulings that such disenfranchisement is constitutionally permissible.

In *Beacham* v. *Braterman,* 300 F.Supp. 182 (1969) (D.C. S.D. Fla.), affirmed October 20, 1969, 396 U.S. 12 disenfranchising Florida constitutional and statutory provisions were upheld. And again, in *Fincher* v. *Scott,* 352 F.Supp. 117 (1972) (D.C. M.D.N.C.), affirmed May 7, 1973, ____ U.S. ____, 41 U.S.L.W. 3594, disenfranchising North Carolina constitutional and statutory provisions were upheld.

The rationale in *Beacham* was that such disenfranchisement *must* be constitutionally permissive because the Justices of the Supreme Court of the United States have on so many occasions used it as an example of what states may do with propriety.

There the Court said:

"The initial question before the Court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which effect that exclusion are valid.

"The Second Circuit Court of Appeals in Green v. Board of Elections of the City of New York, 380 F.2d 445 (1967), cert. den. 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840, recently addressed itself to that question and decided that it presented an insubstantial issue which did not require the convening of a three judge court. We agree with that Court that '[e]ven though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta.' (Emphasis theirs.) See such expressions in Davis v. Beason, 133 U.S. 333, 346-347, 10 S.Ct. 299, 33 L.Ed. 637 (1890); Estep v. United States, 327 U.S. 114, 122, 66 S.Ct. 423, 90 L.Ed. 567 n. 13, (1946); Tropp v. Dulles, 356 U.S. 86, 96–97, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C. J.); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (Douglas, J.); Gray v. Sanders, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (Douglas, J.); and Harper v. Virginia State Board of Elections, 383 U.S. 663, 673, 675

n. 4, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (dissenting opinion of Black, J.)."

Beacham v. *Braterman, supra,* at pp. 183–184.

In *Fincher,* besides adopting this *Beacham* reasoning, the lower court pointed out that the Equal Protection Clause of the United States Constitution, Fourteenth Amendment, Section 1, must be read in light of Section 2 which expressly permits disenfranchisement of convicted felons without reduction of representation of states in Congress.

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. The U. S. Const. amend. XIV, § 2, provides in relevant part:

> But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .

"Section 2 expressly allows the exclusion of felons from the franchise without reduction of representation. As early as 1873, it was stated:

> This view is assumed in the second section of the fourteenth amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section

> assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants.

United States v. Anthony, 24 Fed.Cas. No. 14,459, pp. 829, 831 (C.C.N.D.N.Y. 1873). Recently this position has been restated.

> The framers of the Amendment, says the Attorney General, could hardly have intended the general language of § 1 to outlaw a discrimination which § 2 expressly allowed without the penalty of reduced representation. The argument is convincing. We see nothing in the language or in history to support plaintiff's suggestion that 'other crimes' meant only a crime connected with the rebellion. The Court's rejection of Mr. Justice Harlan's position that § 2 is the only portion of the Fourteenth Amendment dealing with voting rights, see Reynolds v. Sims, supra, 377 U.S. at 589 [84 S.Ct. 1362, 12 L.Ed.2d 506] in no way indicates it would deny that § 1 of the Amendment cannot be fairly read to prohibit a discrimination which § 2 expressly permits—especially in the light of the Justice's frequent and consistent statements approving voting disqualification for felony. [Green v. Board of Elections] 380 F.2d at 452. *Accord*, Kronlund v. Honstein, 327 F.Supp. 71 (N.D.Ga.1971); Beacham v. Braterman, 300 F.Supp. 182 (S.D.Fla.), aff'd

without opinion, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969). *Contra,* Stephens v. Yeomans, 327 F.Supp. 1182 (D.N.J.1970). Putting it positively, we think § 1 must be read in light of § 2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in § 1.

While it may be more desirable from a correctional point of view to give felons the right to vote, Comment, 50 N.C.L. Rev. 903, 909–10 (1972), we are convinced the states are not constitutionally required to do so."

Fincher v. *Scott*, 352 F.Supp. 117, 119 (D.C. M.D. N.C. 1972).

II. There Is a Direct Conflict Between Numerous Circuit and District Courts as to Whether a State May Constitutionally Disenfranchise Convicted Felons Who Are Otherwise Qualified to Vote.

There is a decided direct conflict of authority in the federal courts on the question whether a state may constitutionally deny the right to vote to convicted felons who are otherwise qualified to vote.

Fincher v. *Scott, supra*, 352 F.Supp. 117 (M.D. N.C. 1972) affd. May 7, 1973, ---- U.S. ----, 41 U.S.L.W. 3594; *Kronland* v. *Honstein*, 327 F.Supp. 71 (N.D. Ga. 1971); *Beacham* v. *Braterman,* 300 F. Supp. 182 (S.D. Fla. 1969); and *Green* v. *Board of Elections*, 380 F.2d 445 (2d Cir. 1967), all take the express position that disenfranchisement of convicted felons is constitutionally permissible.

On the other hand, *Dillenburg* v. *Kramer*, 469 F.2d 1222 (9th Cir. 1972) holds that a challenge to the rule of those cases under the theory that the Equal Protection Clause of the Fourteenth Amendment, Section 1 is paramount to the Section 2 provision is substantial enough to require the convening of a three-judge court; and *Stephens* v. *Yeomans*, 327 F. Supp. 1182 (D.N.J. 1970) specifically holds that, as between the two approaches to the problem, the Equal Protection Clause governs.

III. The Supreme Court of California Erred When It Held That the Equal Protection Clause of the Fourteenth Amendment Prevents a State From Disenfranchising Convicted Felons Who Are Otherwise Qualified to Vote.

The Supreme Court of California, in *Ramirez* v. *Brown*, 9 Cal.3d 199 (1973), the case which is the subject of this petition for certiorari, failed to realize that the Fourteenth Amendment, Section 2, permits disenfranchisement of persons convicted of rebellion and other crimes and therefore erroneously concluded that the Equal Protection Clause of the Fourteenth Amendment, Section 1, prevents a state on equal protection grounds from disenfranchising convicted felons who are otherwise qualified to vote.

In reaching its decision, the California Court superficially dismissed the direct holding and philosophical effect of the three major cases *contra: Green* v. *Board of Elections*, 380 F.2d 445 (2d Cir. 1967), cert. den. 389 U.S. 1048 (1968); *Kronlund* v. *Honstein*, 327

F.Supp. 182 (N.D. Ga. 1971); and *Beacham* v. *Braterman*, 300 F.Supp. 182 (S.D. Fla. 1969), affd. without opinion, 396 U.S. 12. It gave no consideration to *Fincher* v. *Scott*, 352 F.Supp. 117 (M.D. N.C. 1972), affd. without opinion, ---- U.S. ----, 41 U.S.L.W. 3594, which had not been referred to in the briefs, and it, instead, based its decision almost totally upon a *nonfelon* voting case for support. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

In doing so, and in its equal protection theory reliance on *Dunn*, the Supreme Court of California neglected the caveat therein contained at page 336:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citations.] This *'equal right to vote,' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.* [Citations.] But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' [Citations.]" (Emphasis added.)

It is submitted that "close constitutional scrutiny" means utilization of the entire Constitution, including Fourteenth Amendment, Section 2 as well as Section 1. Positive as well as negative aspects must be considered to give full import to the meaning of the *Dunn* case.

CONCLUSION

Certiorari is necessary to resolve this novel and unusual legal question which arises from the built-in dichotomy of the Fourteenth Amendment. Does the specific language of Section 2 which recognizes the propriety of disenfranchisement for persons convicted of crime override the general language of Section 1 concerning equal protection? Twice recently this Court has affirmed without opinion cases holding that it does. The jurisdictions and courts are in conflict. Only a full hearing before this Court can resolve the issue. Guidance is necessary and should be given.

WHEREFORE, petitioners pray that this Court issue its writ of certiorari to the Supreme Court of California to review the judgment in the case of *Ramirez* v. *Brown,* No. SF 22916, decision filed March 30, 1973.

Dated: August 17, 1973.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California

IVER E. SKJEIE,
Assistant Attorney General of the State of California

GEORGE J. ROTH,
Deputy Attorney General of the State of California

Attorneys for Petitioners
The People of the State of California, and the Class of County Clerks and Registrars of Voters of California

APPENDIX

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

ABRAN RAMIREZ et al.,
Petitioners,
v.
EDMUND G. BROWN, JR., as Secretary of State, etc., et al.,
Respondents.
S.F. 22918

This is a proceeding for writ of mandate brought by three ex-felons to compel respondent election officials to register them as voters. The case calls into question once again the constitutionality of provisions of California law excluding from the franchise all persons who have been convicted of an "infamous crime." We addressed ourselves to this problem seven years ago in Otsuka v. Hite (1966) 64 Cal.2d 596. Petitioners now ask us to consider the matter further in the light of significant intervening developments in the law of equal protection. As will appear, we conclude that under present standards disfranchisement by reason of conviction of crime is no longer constitutionally permissible.

Petitioner Ramirez is a 43-year-old farmworker, married, with five children. Twenty-one years ago he was convicted in Texas of a felony entitled "robbery by assault." He avers that the offense arose out of an argument in a restaurant, and that at the trial he was without counsel and pleaded guilty on the advice of the judge. After serving only three months in jail he

was released on parole. His parole successfully terminated 11 years ago.

In February 1972 petitioner applied to register to vote in San Luis Obispo County. He was refused registration by respondent San Luis Obispo County Clerk on the sole ground that he had been convicted of a felony and had spent some time in incarceration.

Petitioner Lee, a resident of Salinas, is 54 years old, married, with four children. Eighteen years ago he was convicted of the felony of possession of heroin. After serving two years in prison he was released on parole. His parole successfully terminated 14 years ago.

In March 1972 petitioner applied to register to vote in Monterey County. He was refused registration by respondent Monterey County Clerk on the sole ground that he had been convicted of a felony and had not obtained a pardon from the Governor.

Petitioner Gill is a 45-year-old winery worker, married, with four children. He was convicted in 1952 and 1967 of second degree burglary, and in 1957 of forgery. He avers that his offenses arose out of efforts to obtain money to support a narcotics addiction. On each conviction he served some time in prison, followed by a successful parole.

In April 1972 petitioner applied to register to vote in Stanislaus County. He was refused registration by respondent Stanislaus County Clerk on the sole ground of his prior felony convictions.[1]

[1] The remaining petitioners are the League of Women Voters and three nonprofit organizations which support the interests of ex-convicts. The Secretary of State is named as a respondent in his capacity of chief elections officer of California. Upon application we ordered the Mendocino County Clerk joined as an additional party respondent.

Petitioners invoke the original jurisdiction of this court, and seek relief by writ of mandate. For the reasons stated in Jolicoeur v. Mihaly (1971) 5 Cal.3d 565, 570, footnotes 1 and 2, the case falls within the limited category in which we deem it proper to exercise original jurisdiction, and the prayer is for the appropriate remedy. (Accord, Young v. Gnoss (1972) 7 Cal.3d 18, 21; Wenke v. Hitchcock (1972) 6 Cal.3d 746, 750–751.)

Our alternative writ of mandate directed that respondents "register to vote all ex-felons whose term[s] of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote," or show cause why this should not be done. The clerks of San Luis Obispo, Monterey and Stanislaus counties decided not to contest the issue and advised the court they will hereafter register all such ex-felons who apply, presumably including the present petitioners. It does not follow, however, that this proceeding should be dismissed as moot. The acquiescence of the three named county clerks is in no way binding on election officials of the 55 other counties of California in which the petitioners might choose to reside. Moreover, it is undisputed that in many of those other counties there are ex-felons among the resident population who have been or would be refused registration on the precised ground here challenged.[2] The case thus poses a question which is of

[2] Exact figures are difficult to obtain. Obviously almost every person convicted of felony and sentenced to prison sooner or later becomes an "ex-felon," and petitioners estimate there are 100,000 such persons in California today. Only those who wish to vote and who live in counties which refuse to register them, of course, are relevant here. Nevertheless we may fairly infer that their number is not insignificant, in view of (1) a recent survey of county election practices conducted by the Secretary of State, disclosing a wide variety of crimes which have been

broad public interest, is likely to recur, and should receive uniform resolution throughout the state. In such circumstances we deem it appropriate to exercise our inherent discretion to resolve the issue, "even though an event occurring during its pendency would normally render the matter moot." (In re William M. (1970) 3 Cal.3d 16, 23; accord, Liberty Mutual Ins. Co. v. Fales (1973) 8 Cal.3d 712, 715–716, and cases cited; see also Roe v. Wade (1973) ---- U.S. ----, ----, 41 U.S.L.Week 4213, 4217). This rule is particularly applicable to challenges to the validity of election laws. (See, e.g., Zeilenga v. Nelson (1971) 4 Cal.3d 716, 719–720; see also Goosby v. Osser (1973) ---- U.S. ----, ----, 41 U.S.L.Week 4167, 4168, fn. 2.)

One further preliminary point requires discussion. At the time petitioners were refused registration, respondents' constitutional authority was former article II, section 1, of the California Constitution, which provided in part that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State. . . ." By the passage of Proposition 7 at the November 7, 1972, general election the people repealed this language and substituted therefor the following new article II, section 3: "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely

deemed to disqualify ex-felon applicants from voting, and (2) the strong likelihood that additional ex-felons have been discouraged by these laws and practices from even applying to register.

mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." We consider the effect, if any, of this amendment.

It is first apparent that whereas the former section itself prohibited all persons convicted of an "infamous crime" from voting, the new section declares that "The Legislature shall provide" for that result. We apprehend no difference in substance. As we explained in *Otsuka* (64 Cal.2d at pp. 607–608), since its first session the Legislature has often undertaken to implement the voting disqualifications of the Constitution, and the present Elections Code contains a number of statutes bearing on the exclusion of ex-felons from the franchise.[3] Petitioners candidly concede that the passage of Proposition 7 cannot reasonably be construed as an implied repeal of all such provisions, wiping the statute books clean for future legislation on the same subject. Repeals by implication are not favored (Warne v. Harkness (1963) 60 Cal.2d 579, 587–588), and at no time in the progress of Proposition 7 through the Legislature or during its presentation to the voters was there the slightest indication it was intended to have so drastic a result. It follows that the addition of the words, "The Legis-

[3] Sections 310 and 321 provide that the affidavit of registration shall show whether the affiant has been convicted of "a felony which disqualifies him from voting." Sections 383, 389, and 390 direct the county clerk to cancel the registration of all voters who have been convicted of "any infamous crime or of the embezzlement or misappropriation of any public money." Sections 14240 and 14246 permit a voter's qualifications to be challenged on the ground that he has been convicted of "a felony" or of "the embezzlement or misappropriation of public money."

ature shall provide," must be interpreted merely as an express recognition of the legislative authority which has in fact been exercised since the earliest days of our state government. And in so specifying, new article II conforms its language with that of article XX, section 11, which has provided since its adoption in 1879 that "Laws shall be made" to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, "or other high crimes." (See also Const. of 1849, art. XI, § 18.)

The second relevant change in wording brought about by the adoption of new article II, section 3, is the deletion of the word "ever" from the provision of former article II, section 1, that no person convicted of an infamous crime "shall ever exercise the privileges of an elector in this State." Again we perceive no change in legal effect. Even under the prior language a person denied the right to vote by reason of conviction of crime did not in actuality remain "forever" disfranchised: as we pointed out in *Otsuka* (at p. 604 of 64 Cal.2d), the Legislature has expressly provided for restoration of the right to vote to such persons "either by court order after completion of probation (Pen. Code, § 1203.4) or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings (Pen. Code, §§ 4852.01-4852.17)." And no such legislation was necessary, of course, to restore the right to vote to a previously insane person who recovered his sanity, or to a former illiterate who achieved literacy. Accordingly, the sole possible meaning of the word "ever" as used in former article II, section 1, was that "at no time in the future" would a person under constitutional disqualification from voting be allowed to vote. Thus the word was merely emphatic surplusage, and with its dele-

tion the Constitution reverted in this respect to the simpler language of the first such provision in California law.[4]

We conclude that under both the present and former article II of our Constitution, the controlling issue is whether the disfranchisement of all persons who have been convicted of crime violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

When this issue was presented to us in Otsuka v. Hite (1966) supra, 64 Cal.2d 596, we resolved it by invoking the then current rules for applying the equal protection clause to a restriction on a fundamental interest such as the franchise. We began by identifying the "compelling state interest" served by denying ex-felons the right to vote. (*Id.* at pp. 602–603.) That interest, we determined, was "to protect 'the purity of the ballot box' against abuses by morally corrupt and dishonest voters operating to the detriment of the electorate as a whole" (*id.* at p. 611)—in short, to deter election fraud.

We then turned to the second branch of the prevailing equal protection test, namely, an inquiry into whether the restriction was "drawn with sufficient specificity." (*Id.* at p. 603.) At the time of *Otsuka,*

[4] Article II, section 5, of the Constitution of 1849 declared that "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector."

There is no merit in petitioners' argument that deletion of the word "ever" signifies that a person convicted of crime is hereafter disfranchised only so long as he is on probation or is serving his sentence. In drafting the amendments which eventually became new article II, the California Law Revision Commission proposed express language to limit disfranchisement to that period. (Cal. Const. Revision Com., Proposed Revision of the Cal. Constitution (1970) pt. 2, p. 18.) The Legislature, however, declined to adopt the change when it submitted Proposition 7 to the voters.

however, the contours of that requirement had not been clearly delineated by the United States Supreme Court. The most recent authority then was Harper v. Virginia Board of Elections (1966) 383 U.S. 663, filed just 60 days before *Otsuka*. In holding that a state poll tax violated the equal protection clause, the high court reasoned (at p. 666) that "Voter qualifications have *no relation* to wealth nor to paying or not paying this or any other tax." (Italics added; fn. omitted.)[8] Hence it was still generally believed that the requirement of specificity was satisfied if the court could find a "reasonable relationship" between the restriction and the articulated state interest.

Our analysis in *Otsuka* followed the traditional path. We began (at p. 603) by quoting McLaughlan v. Florida (1964) 379 U.S. 184, 191, for the proposition that "The courts must reach and determine the question whether the classifications drawn in a statute are *reasonable* in light of its purpose." (Italics added.) We then demonstrated the "unreasonableness" of a classification which disfranchises all ex-felons without distinction: raising the possibility of citizens losing the right to vote upon conviction of felonies of a comparatively minor nature, we cited *Harper* for the conclusion that "No *reasonable relation* is apparent between this result and the purpose of protecting the integrity of the elective process." (Italics added.) Such malum prohibitum conduct, we reiterated, may be "totally *unrelated* to the goal of preservation of the integrity of the elective process." (Italics added; fn. omitted.) (*Id.* at p. 606).

[8] It was only several years later and with the advantage of hindsight that we were able to view *Harper* as a transitional decision, the "implication" of which was that "more than 'rationality' must be demanded of state voter qualifications." (Castro v. State of California (1970) 2 Cal.3d 223, 235.)

Accordingly, in order to save the constitutionality of article II we held that it could be permitted to disfranchise only those voters who have been convicted of a certain limited class of offenses which we defined as follows (at p. 611): "the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it *may reasonably be deemed* to constitute a threat to the integrity of the elective process." (Italics added; fn. omitted.) Finding no such threat in the fact that the plaintiffs in *Otsuka* had been convicted 20 years earlier of refusing to serve in the armed forces because of conscienstious objections, we reversed a judgment upholding a refusal to register them as voters.

In the seven years since *Otsuka,* however, the test for judging the constitutionality of a state-imposed limitation on the right to vote has become substantially more strict. At least since 1969 it is not enough that there be a rational relation between the restriction and the compelling state interest; the restriction is now constitutionally permissible only if it is "necessary" to promote that interest, and to be "necessary" it must constitute, inter alia, the "least burdensome" alternative possible. We proceed to document this evolution of the law.

In Kramer v. Union School District (1969) 395 U.S. 621, the United States Supreme Court was called upon to review the constitutionality of a New York statute which excluded from voting in school district elections persons who neither owned nor leased real property in the district, or who were not parents of children in the local schools. The court set forth the

controlling test in the following language (at pp. 626-627): "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a compelling state interest." (Italics added.)

The school authorities contended they had a compelling interest in limiting the right to vote in school district elections to persons "primarily interested in school affairs." The high court assumed arguendo that the claimed concern was legitimate, but emphasized (at p. 632) that the classifications resulting from the statute must nevertheless "be tailored so that the exclusion of appellant [a nonparent neither owning nor leasing real property in the district] and members of his class is *necessary* to achieve the articulated state goal." (Italics added; fn. omitted.) Invalidating the statute, the court held the classifications were not "necessary" in the sense that they were both overinclusive and underinclusive.[6] (Accord, Cipriano v. City of Houma (1969) 395 U.S. 701; Turner v. Fouche (1970) 396 U.S. 346; Evans v. Kornman (1970) 398 U.S. 419; Phoenix v. Kolodziejski (1970) 399 U.S. 204.)

In two cases decided last term the United States Supreme Court struck down state-imposed restrictions on the franchise on the ground they were not "necessary" in yet another sense, i.e., they were not the least burdensome means available of achieving the articulated state interest. First, in Bullock v. Carter (1972)

[6] "The classifications in [the New York statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." (Fn. omitted.) (*Id.* at p. 632.)

405 U.S. 134, the court unanimously invalidated a Texas statutory scheme whereby certain candidates for public office were required to pay substantial filing fees for the right to run in primary elections. The court recognized that the state has a legitimate interest in regulating the number of candidates on the ballot and in protecting "the integrity of its political processes from frivolous or fraudulent candidacies." (*Id.* at p. 145.) The court also conceded that large filing fees will tend in fact to limit the number of candidates on the ballot, and "There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy" (*id.* at pp. 145–146). Nevertheless the court ruled (at p. 146) not only that the filing fee requirement was both underinclusive and overinclusive, but also that "other means to protect those valid interests are available." The court did not articulate the "other means" intended, but we infer from its reliance on Jenness v. Fortson (1971) 403 U.S. 431, that such means at least include the use of nominating petitions signed by a prescribed percentage of registered voters.

Even more in point is Dunn v. Blumstein (1972) 405 U.S. 330, decided a month after *Bullock*. At issue in *Dunn* was the constitutionality of the requirements of Tennessee law that a voter be a resident of the state for one year and of the county for 90 days in order to exercise the sufferage. The high court reiterated the strict equal protection test of *Kramer* (*id.* at p. 342), and emphasized in particular that "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict

constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations] and must be 'tailored' to serve their legitimate objectives. [Citation.] And if there are *other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity,* a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' " (Italics added.) (*Id.* at p. 343.)

Tennessee first contended it had a compelling interest in "preserving the purity of the ballot box." The high court apparently found this phraseology somewhat overblown, calling it a "formidable sounding" state interest. (*Id.* at p. 345.) But the court then conceded that when the purpose of the statutory scheme is narrowed down to prevention of election fraud by nonresidents' falsely swearing they are eligible to vote, it does constitute a legitimate governmental goal. Nevertheless, the court held that durational residence requirements were not "necessary" to achieve that goal because two less burdensome means of doing so were available.

First, the court stressed that early abuses have been eliminated by the development of elaborate procedural safeguards governing election practices: "Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration. [Citations.] Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents." (Fn. omitted.) (*Id.* at p. 346.)

Second, the court gave full weight to the fact that election fraud in Tennessee is also punishable as a

crime: "Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared." (Fn. omitted.) (*Id.* at p. 353.) After reviewing a half-dozen Tennessee statutes defining "offenses to deal with voter fraud," the court concluded (at pp. 353–354): "Where a State has available such remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud." (See also United States v. State of Texas (W.D. Tex. 1966) 252 F.Supp. 234, 251, fn. 71, motion to affirm granted without opinion, 384 U.S. 155.)[7]

This constitutional evolution finds its parallel in the decisions of our court since *Otsuka*. To begin with, in Castro v. State of California (1970) supra, 2 Cal.3d 223, 235, we explicitly recognized for the first time that in *Kramer* the United States Supreme Court "announced the new constitutional standard" discussed above. Applying that standard, we reviewed a requirement in the very constitutional provision here in issue—former article II, section 1—that voters be literate in the English language. We began by identifying a compelling state interest served by that require-

[7] As an additional compelling state interest, Tennessee urged that long-time residents are more likely to vote intelligently because they are more informed about local issues. Without deciding whether this is a legitimate state concern, the court ruled that durational residence requirements are both underinclusive and overinclusive for this purpose, and concluded: "Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." (*Id.* at p. 360.)

ment, namely, "California's concern that those of her citizens who are eligible to vote likewise be capable of informed decisions on matters submitted to the electorate" (*id.* at p. 237). But the remainder of our opinion was devoted to showing that literacy in English is not "necessary" to promote that concern because of the existence of a reasonable alternative, i.e., access by persons literate in Spanish to spoken or printed sources of political information in the Spanish language comparable to those available in English. (*Id.* at pp. 238–242.) As to such persons, we concluded, the English literacy requirement could not constitutionally be applied.[8]

In a group of cases after *Castro* not involving the exercise of the franchise but challenging statutes affecting other fundamental rights or based on suspect classifications, we likewise held that a restriction which is not the least burdensome available is not "necessary" to promote any state interest.[9] In In re Antazo (1970) 3 Cal.3d 100, we assumed arguendo that imprisonment of indigent defendants sentenced to pay a fine served the state's claimed purposes of collecting such fines and rehabilitating the offenders. We concluded, however, that imprisonment was not "necessary" to promote either purpose because the state has available to it alternative and less burdensome means of enforcing payment of fines. (*Id.* at pp. 114–115.)

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[8] Although vacated on other grounds (403 U.S. 915), our decision in Westbrook v. Mihaly (1970) 2 Cal.3d 765, 788–795, adopted a similar analysis in invalidating the requirement of two-thirds approval of those voting for passage of local general obligation bond issues.

[9] In two additional decisions we found no compelling state interest whatever, and therefore did not reach the question of necessity. (Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 301; In re Gary W. (1971) 5 Cal.3d 296, 308.)

Again, in Zeilenga v. Nelson (1971) supra, 4 Cal.3d 716, Camara v. Mellon (1971) 4 Cal.3d 714, and Thompson v. Mellon (1973) ---- Cal.3d ----, we held that residence requirements of five, three, and two years respectively for candidacy for public office were not necessary to insure that the candidate was knowledgeable about local conditions, because such requirements were not the "least restrictive method" of doing so. (*Id.* at p. 723.) In Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, we ruled that the prohibition against women bartenders was not necessary to prevent improprieties in the sale of alcoholic beverages because that evil "can be directly prevented through nondiscriminatory legislation" such as general regulatory and penal statutes. (*Id.* at pp. 20–21.) And in Serrano v. Priest (1971) 5 Cal.3d 584, we declared that California's school financing system was not "necessary" to promote either of the two compelling interests asserted, i.e., administrative and fiscal control over the schools at the local level. (*Id.* at pp. 610–611.)

Finally, we applied this test in a recent voting rights case. The issue in Young v. Gnoss (1972) supra, 7 Cal.3d 18, was the constitutionality of the requirements of California law that a voter be a resident of the county for 90 days and of the precinct for 54 days in order to exercise the suffrage. After rejecting certain claimed justifications for these durational residence requirements as insufficiently compelling (*id.* at pp. 24–26), we considered the asserted need to furnish local election officers with affidavits of registration and indexes of registered voters so as to permit identification of prospective voters. The timely delivery of such documents, we said, is "essential to the conduct of the election, and constitutes a compelling governmental interest. But the question remains

whether the closing of registration 54 days before the election is *necessary* to achieve that goal." (Italics added.) (*Id.* at p. 26.)

We found no such necessity. Instead, we emphasized that alternate means were available to solve the problem of a last-minute influx of registrations, e.g., by delivering the affidavit books and voter indexes in two cycles rather than one. (See also Stats. 1972, ch. 1356.) We therefore concluded (at pp. 26–27) that to cut off all registration 54 days before the election in order to promote this governmental purpose "is not the method which is the least burdensome on the exercise of the right of suffrage within the meaning of *Dunn*." (Italics in original).

In the light of this evolution of the law of equal protection, the analysis in *Otsuka* of the constitutionality of disfranchising persons convicted of crime appears no longer adequate.[10] For present purposes we may adhere to the determination in *Otsuka* that the purpose of that disfranchisement is to deter election fraud; but we must now also consider whether so drastic a remedy is "necessary in the sense that it is the least burdensome means available to achieve that goal." (Young v. Gnoss (1972) supra, 7 Cal.3d 18, 22.) We shall find the answer to our inquiry, as did the United State Supreme Court in *Dunn*, by examining the

[10] For the same reason, three federal cases on disfranchisement of ex-felons are no longer persuasive. (Green v. Board of Elections of City of New York (2d Cir. 1967) 380 F.2d 445; Kronlund v. Honstein (N.D. Ga. 1971) 327 F.Supp. 71; Beacham v. Braterman (S.D. Fla. 1969) 300 F.Supp. 182, motion to affirm granted without opinion, 396 U.S. 12.) Later federal decisions have appropriately distinguished these precedents. (Dillenburg v. Kramer (9th Cir. 1972) 469 F. 2d 1222, 1225–1226; Stephens v. Yeomans (D.N.J. 1970) 327 F.Supp. 1182, 1185–1187.)

state's "total statutory scheme for regulating the franchise." (405 U.S. at p. 346.)

In the early years of California political history, that scheme was rudimentary at best. The first act to regulate elections (Stats. 1850, ch. 38, p. 101) included only a handful of sections governing the casting and counting of votes. The statute declared that "The voting shall be by ballot" (§ 24), but made no provision for furnishing official ballots printed by the state and uniform in appearance and content. Instead, each voter brought his own ballot or "ticket" to the polls, consisting of a piece of paper on which he had written—or, more commonly, a political party or candidate had printed—his choices for the various offices.[11]

Although challenges were permitted (§§ 27–31), no voter was required to register, and the ballots were obviously not numbered. The statute simply provided (§ 25) that "Whenever any person offers to vote, the Inspector shall pronounce his name in an audible voice, and if there be no objection to the qualification of such person as an elector, shall receive his ballot, and in the prescence of the other Judges put the same,

[11] "The tickets were merely long, narrow slips of paper, headed by a vignette, on which were printed the names of a party's candidates for each office. They were given out to the faithful on election day by party ticket peddlers who stationed themselves on the streets and corners around the polls. This system was frequently abused. In some of the more partisan wards a voter could search blocks and blocks before finding a consentient ticket peddler. Even with ticket in hand the elector had to maintain his vigilance, for it was not uncommon for contending factions or parties to counterfeit their opponents' tickets, substituting one or two of their own for the names listed on the regular ticket. Under these circumstances, if the elector was not wary, he might then vote for a couple of opposition candidates, while under the impression he was casting a straight party ticket." (Petersen, *The Struggle for the Australian Ballot in California* (1972) 51 Cal. Hist. Q. 227–228; see also Kirk v. Rhoads (1873) 46 Cal. 398, 406.)

without being opened or examined, into the ballot box." The system thus made it possible for unqualified persons such as nonresidents or aliens to vote, and for a voter in a single election to cast a ballot more than one time or at more than one polling place. Moreover, "Because the ballot box usually stood in the center of a public room, secret voting was difficult and manipulation relatively easy." (Petersen, *op. cit.* supra, p. 229.)[12]

Finally, "The problem was compounded because the dominant political faction in a precinct, ward, or county, usually controlled the appointment of election officials. Therefore, even if the voting was conducted by the rules, it was uncertain whether the ballots would be honestly tabulated." (Petersen, *op. cit.* supra, p. 229.) Little assurance could be gained from the statute, which provided only that after closing the polls the election official were to open the ballot box, count the ballots, and send the totals to the county clerk either by mail or "by private hand." (§§ 33–36.)

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[12] A contemporary eyewitness account of an early California election describes as follows a not uncommon method of manipulating available aliens: "The various candidates, for example, would round up these prospective voters like so many cattle, confine them in corrals (usually in the neighborhood of Boyle Heights), keep them in a truly magnificent state of intoxication until the eventful morning, and then put them in stages hired from either Banning or Tomlinson for the purpose; and from the time the temporary prisoners left the corral until their votes had been securely deposited, they were closely watched by guards. On reaching the voting place, the captives were unloaded from the stage like so much inanimate baggage, and turned over to friends of the candidate to whom, so to speak, for the time being they belonged. One at a time, these creatures were led to vote; and as each staggered to the ballotbox, a ticket was held up and he was made to deposit it. Once having served the purpose, he was turned loose and remained free until another election unless, as I have intimated, he and his fellows were again corralled and made to vote a second or even a third time the same day." (Newmark, Sixty Years in Southern California (4th ed. 1970) p. 42.)

In such circumstances the disfranchisement of persons convicted of an "infamous crime" (§ 12) may well have been necessary to minimize the more egregious frauds practiced on the electorate by unscrupulous candidates or voters. But the law on this subject has not remained static. In the ensuing century there have been numerous movements for electoral reform, resulting in a complex series of amendments to the voting laws. To cite only the major legislative efforts to curb election fraud, we note that in 1866 the first voter registration act was adopted. (Stats. 1865–1866, ch. 265, p. 288.) In 1872 the new Political Code required that every ballot "be of paper uniform in size, color, weight, texture, and appearance" (§ 1187), specified in detail the size and content of the ballot (§ 1191), and directed the Secretary of State to procure and sell such paper to the public (§§ 1188–1189). The code also contained elaborate provisions designed to promote secrecy in voting by forbidding that a ballot be marked on the outside or folded in any manner intended to indicate its contents. (§§ 1196–1199, 1206–1207.)

Voting secrecy was assured, however, by the adoption of the Australian ballot two decades later. (Stats. 1891, ch. 130, p. 165.) Under this legislation all ballots were furnished at public expense (§ 1), on paper bearing an undisclosed watermark (§ 12), consecutively numbered with a corresponding stub (§ 13), and printed with the names of the duly nominated candidates in alphabetical order *(ibid.)*. In addition, private booths were provided for the actual marking of the ballots (§ 19); each voter received his ballot directly from the election official at the polls (§ 20); and in marking his ballot each voter was required to use a stamp and ink pad furnished in the voting booth (§ 21).

After several false starts, the Legislature has also taken advantage of various technological developments in the election process. Each such development, of course, has tended to make it more difficult for dishonest individuals to tamper with either the casting or the counting of the ballots. Thus in 1903 the use of voting machines was authorized, permitting mechanical tabulation of results. (Stats. 1903, ch. 226, p. 262; see also Stats. 1923, ch. 96, p. 182.) In 1949 the Legislature provided for punch-card voting and electromechanical tabulation. (Stats. 1949. ch. 41, p. 57.) And in 1953 it authorized the marking of ballots by specially prepared pencils, with consequent electronic tabulation of the vote. (Stats. 1953, ch. 1046, p. 2514.)

Taken together, these and other reforms of the past hundred years have radically diminished the possibility of election fraud in California. The voting and counting process is now thoroughly hemmed in by control mechanisms at every stage, so that deliberate irregularities, "if present today, are rare and have negligible effects on election results." (Note (1967) 14 U.C.L.A. L.Rev. 699, 702 (reporting that the Los Angeles County Registrar of Voters had received no complaints of this type for the previous 41 years).) In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squadron of computer technicians.[13]

[13] The Legislature itself has recognized the contemporary irrelevance of the availability of liquor to election results by repealing its long-standing ban on the sale of alcoholic beverages during polling hours. (Former Bus. & Prof. Code, § 25630, repealed by Stats. 1969, ch. 614, p. 1253.)

Turning to the second point emphasized in *Dunn*—the range of penal sanctions available to prevent election fraud—we observe a similar development. The California Constitution has directed since its inception that the right to vote shall be supported by laws not only regulating elections but also "prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice." (Const. of 1849, art. XI, § 18; Const. of 1879, art. XX, § 11; new art. II, § 3, eff. Nov. 8, 1972.) The response of the Legislature to this directive has grown dramatically over the years. The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110–111, §§ 98–105.) Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors.[14] Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000–12008),[15] intimidating voters by threat or

[14] We noted some of these sanctions in *Otsuka* (64 Cal.2d at p. 603, fn. 3), but of course did not view them in the light thereafter cast on the issue by *Dunn*.

[15] Certain of these provisions are especially elaborate:

Section 12000: "A person shall not directly or through any other person receive, agree, or contract for, before or during an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person for either:

"(a) Voting or agreeing to vote.

"(b) Coming or agreeing to come to the polls.

"(c) Refraining or agreeing to refrain from voting.

"(d) Voting or agreeing to vote for any particular person.

bribery (§§ 29130–29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430–29431), fraud or forgery in casting absentee ballots (§§ 14690–14692), tampering with voting machines (§ 15280) or ballot boxes (§§ 17090–17092), forging or altering election returns (§§ 29100–29103), and so interfering "with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted"

"(e) Refraining or agreeing to refrain from voting for any particular person."

Section 12001: "A person shall not directly or through any other person receive any money or other valuable thing, during or after an election, because he or any other person:

"(a) Voted or refrained from voting for any particular person.

"(b) Came to the polls or remained away from the polls.

"(c) Induced any other person to:

"(1) Vote or refrain from voting.

"(2) Vote or refrain from voting for any particular person.

"(3) Come to or remain away from the polls."

Section 12003: "A person shall not directly or through any other person pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

"(a) Induce the voter to:

"(1) Vote or refrain from voting at any election.

"(2) Vote or refrain from voting at an election for any particular person.

"(3) Come to the polls at an election.

"(4) Remain away from the polls at an election.

"(b) Reward the voter for having:

"(1) Voted.

"(2) Refrained from voting.

"(3) Voted for any particular person.

"(4) Refrained from voting for any particular person.

"(5) Come to the polls at an election.

"(6) Remained away from the polls at an election."

Each of these offenses is punishable by an indeterminate prison term of one to seven years. (§ 12012.)

(§ 17093).[16] These sanctions are even more pervasive than those characterized by the Supreme Court in *Dunn* as "more than adequate to detect and deter whatever fraud may be feared." (405 U.S. at p. 353.)

In holding that a challenge to state laws identical to those here in issue required the convening of a three-judge federal court, the Ninth Circuit Court of Appeals reasoned: "Earlier in our constitutional history, laws disenfranchising persons convicted of crime may have been immune from attack. But constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber. 'Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.' (Harper v. Virginia Board of Elections (1966) 383 U.S. 663, 669, 86 S.Ct. 1079, 1083, 16 L.Ed. 2d 169.) In the wake of the many decisions dismantling restrictions on voting rights, we cannot say that this challenge to Washington laws is now unsubstantial." (Dillenburg v. Kramer (1972) supra, 469 F.2d 1222, 1226.)[17]

The same challenge to California's laws on this topic is not only substantial, it is meritorious. For the reasons stated in *Dunn*, we hold that the enforcement of modern statutes regulating the voting process and

[16] In addition, the code contains a great many directives of all kinds to the various participants in the election process, and declares generally that "Every person who willfully violates *any* of the provisions of the laws of this State relating to election is, unless a different punishment is prescribed by this code, punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the state prison not exceeding five years, or by both." (Italics added.) (§ 29001; see also § 29002.)

[17] Similarly, the United States Supreme Court recently ruled that a substantial constitutional issue was presented by an attack on a Pennsylvania statute which prohibits from voting all persons confined in penal institutions awaiting trial. (Goosby v. Osser (1973) supra, ____ U.S. ____, 41 U.S.L.Week 4167.)

penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is the least burdensome on the right of suffrage. It follows that such disfranchisement is not "necessary," within the meaning of *Dunn* and its predecessors, to achieve that goal. We conclude that, as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification (*ante*, fn. 3), violate the equal protection clause of the Fourteenth Amendment.[18]

The alternative writ, having served its purpose, is discharged, and the petition for peremptory writ is denied. All parties shall recover their costs from the State of California. (See Code Civ. Proc., § 1095.)

MOSK, J.

WE CONCUR:
WRIGHT, C.J.
McCOMB, J.
TOBRINER, J.
BURKE, J.
SULLIVAN, J.
*TAYLOR, J.

[18] Respondent Secretary of State asks us to reaffirm the constitutionality of statutes which deny the suffrage to all felons who are currently incarcerated or on parole. (Pen. Code, §§ 2600, 3054.) The question whether the disfranchisement of such persons is today constitutionally permissible is not presented in the case at bar. The individual petitioners herein have all been discharged from prison and have successfully completed their parole; the prayer of the petition requests only that respondents be directed to register ex-felons whose terms of incarceration and parole have expired, and our alternative writ was so limited.

* Assigned by the Chairman of the Judicial Council.

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FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-324

THE PEOPLE OF THE STATE OF CALIFORNIA, and the CLASS OF COUNTY CLERKS and REGISTRARS OF VOTERS OF CALIFORNIA,

Petitioners,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7th STEP FOUNDATION, INC., (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and EDMUND G. BROWN JR., Secretary of State of the State of California,

Respondents.

Memorandum Opposing Certiorari

EDMUND G. BROWN JR.
DANIEL HAYS LOWENSTEIN
111 Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-6371

Attorneys for Respondent
EDMUND G. BROWN JR.
Secretary of State of the
State of California

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Respondents.

Memorandum Opposing Certiorari

This is the second petition for certiorari seeking review of the decision of the California Supreme Court in *Ramirez* v. *Brown,* 9 C.3d 199, 507 P.2d 1345, 107 Cal.Rptr. 137. The Court has already granted the petition of Viola N. Richardson, the County Clerk and Registrar of Voters for Mendocino County in *Richardson* v. *Ramirez,* No. 72-1589. The present petition should be denied because it raises no substantive issues in addition to those presented by *Richardson* v. *Ramirez,* and because it is seriously defective procedurally.

The issue raised by this petition and by *Richardson* v. *Ramirez* is whether California may constitutionally deny the right to vote to persons who have been convicted of "infamous crimes," notwithstanding that they have completed their terms of prison and parole. In the Court below respondent Secretary of State Brown was represented by the Attorney General of California, who represents the present petitioners. Respondent Brown took the position before the California Supreme Court that its previous decision in *Otsuka* v. *Hite,* 64 C.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284 (1966) had led to a lack of uniformity in the several California counties. The Secretary of State's office had conducted a survey of all fifty-eight counties, which indicated that many former felons eligible to vote in some counties would be ineligible in others. The Secretary of State, represented by the Attorney General, urged the California Supreme Court to clarify the eligibility of former felons to vote. The Secretary of State and the Attorney General did not take any position on the merits other than to urge such clarification, and never suggested that there was any state interest, compelling or otherwise, that required disenfranchisement of former felons.

When the petition for certiorari was filed in *Richardson* v. *Ramirez, supra,* respondent Secretary of State Brown requested the California Attorney General to represent him before this Court. Since the request made to the California Supreme Court by the Attorney

General in behalf of Secretary of State Brown for a clarification of the voting rights of former felons had been fully satisfied, the Secretary of State requested that the Attorney General oppose the petition for certiorari. The Attorney General refused to represent the Secretary of State, and instead filed the present petition, purportedly in behalf of "the People of the State of California, and the Class of County Clerks and Registrars of Voters of California."

Since the People of the State of California were not parties in the court below, they have no standing to seek a writ of certiorari at this time. This point has been acknowledged by the Attorney General in his letter of August 29, 1973, to the Clerk of the Court. Although the Attorney General purports to represent "the Class of County Clerks and Registrars of Voters of California," and although this class was a party in the Court below, the Attorney General has not named as a petitioner any specific representative of the class he purports to represent. Respondent Brown is unaware of any authority which authorizes the filing of a petition for writ of certiorari in behalf of a class in the absence of at least one representative of the class.

Aside from the legal question whether the class of county clerks and registrars of voters may seek a petition for writ of certiorari in the absence of a named class representative, there is a serious factual question whether the Attorney General actually represents the class in filing the present petition. A survey recently

conducted by the Secretary of State's office of all fifty-eight county clerks and registrars of voters in California suggests that the vast majority are satisfied with the decision of the California Supreme Court. Specifically, fifty-two of the fifty-eight county clerks and registrars of voters, representing counties which contain 97.39 percent of the registered voters of California, indicated such satisfaction. In addition, in a survey of election officials in nineteen California counties, including the sixteen largest counties, only two counties indicated that they had authorized the Attorney General to file the present petition in their behalf, and officials in both of these counties stated that they gave such authorization at the request of the Attorney General, not because of any dissatisfaction with the decision in *Ramirez* v. *Brown, supra.*

The substantive issue raised by the present petition is whether the State of California may deny the suffrage to an otherwise eligible voter who has in the past been convicted of an "infamous crime" and has completed his term of prison and parole. As the chief elections officer of California, respondent Secretary of State Brown represents to the Court that the "infamous crime" voting disability provides no administrative benefit to the state whatsoever. To the contrary, the ruling of the California Supreme Court in *Ramirez* v. *Brown* greatly eases the administrative burden which previously was imposed on election officials. Prior to the *Ramirez* v. *Brown* decision, each county had to determine for itself which convictions would

be grounds for disenfranchisement from voting. Once such a determination was made, it had to be implemented by the county clerk's office and by thousands of deputy registrars of voters, who usually are private citizens who register voters on a part-time basis. Since deputy registrars were frequently unable to decide individual cases, questionable voters were generally referred to the county clerk's office. The "infamous crime" voting disability thus made the process of registering voters more complicated and undoubtedly discouraged some qualified electors from registering to vote. Under the decision of the California Supreme Court, these administrative burdens are either eliminated or greatly simplified. The seriousness of the administrative burden which was imposed by the "infamous crime" disqualification provision is confirmed by the aforementioned survey of county election officials which indicated widespread support for the decision of the California Supreme Court.

In light of the administrative considerations stated above, the "infamous crime" voting disqualification can only be justified, if at all, on grounds of general policy. It is doubtful, however, whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore,

the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.

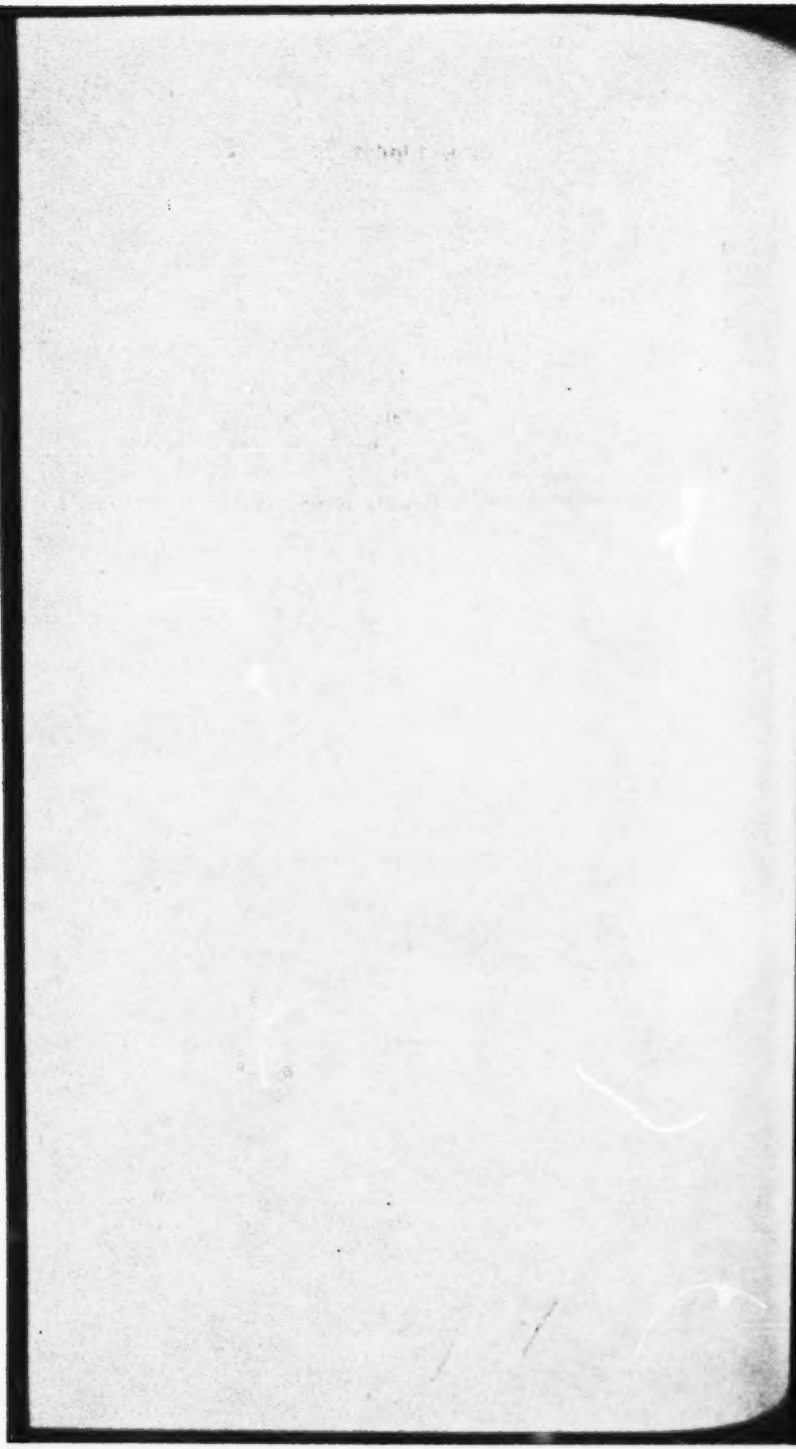
Further discussion of the substantive issues presented by the present petition would be inappropriate in light of the granting of the petition in *Richardson v. Ramirez*. All the substantive issues will be fully aired in the *Richardson* case, and Rule 42(4) of this Court provides the California Attorney General with ample opportunity to present his arguments and views in that case. Since the present petition is duplicative and procedurally defective, this Court should avoid complex procedural questions by exercising its discretion to deny the petition for a writ of certiorari.

Dated: October 19, 1973

Respectfully submitted,

Edmund G. Brown Jr.
Daniel Hays Lowenstein

Attorneys for Respondent
Edmund G. Brown Jr.
Secretary of State of the
State of California



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-324

THE PEOPLE OF THE STATE OF CALIFORNIA, and the CLASS OF COUNTY CLERKS and REGISTRARS OF VOTERS OF CALIFORNIA, *Petitioners,*

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and EDMUND G. BROWN, JR., Secretary of State of the State of California, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, individually and on behalf of a

class of over 100,000 previously disfranchised California electors, respectfully pray, for the reasons expressed herein, that the petition for writ of certiorari be denied. Furthermore, pusuant to Rule 24(2) of this Court, respondents object to the California Attorney General's attempt to invoke this Court's jurisdiction and hereby move that his petition be dismissed.

QUESTIONS PRESENTED

1. Whether non-parties to a judgment by the California Supreme Court, declaring unconstitutional the unequal application of California's voting laws, may properly petition this Court for a writ of certiorari.

2. Whether the denial of the right to vote, through the unequal application of California's voting laws, violates the principles of equal protection.

STATEMENT OF THE CASE

Article II, Section 3 of the California Constitution denies suffrage to those who have been convicted of "infamous crimes". In 1966, the California Supreme Court interpreted Article II, Section 1 and related constitutional and statutory provisions to exclude from the voting rolls only those ex-felons who had been convicted of crimes which threatened "the purity of the ballot box". *Otsuka v. Hite,* 64 Cal.2d 596 (1966). Following that decision, California's 58 Registrars of Voters established 58 separate and often inconsistent

policies as to which of California's several hundred felonies were "infamous crimes" and which were not.

Because of the peculiar nature of the petition filed by the Attorney General of California, Respondents have set forth in detailed chronological order both the proceedings below and in this Court.

1] Having been denied registration solely because of their felony convictions, Respondents, Ramirez, Gill, and Lee, sought an original writ of mandate in the California Supreme Court on behalf of themselves and those California ex-felons whom they represented[1] to require California's Chief Election Officer, the Secretary of State, and all of California's 58 County Registrars to register those ex-felons whose terms of incarceration and parole had expired.[2] The original jurisdiction of the California Supreme Court was invoked because of the state-wide impact of the questions involved and the then impending national elections. *Ramirez v. Brown,* 9 Cal.3d 199, 202-203 (1973).

2] The petition in *Ramirez v. Brown, supra,* named as respondents the Secretary of State of California and three County Clerks, individually and as

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[1]Other named Respondents are three non-profit organizations whose members are directly adversely affected by ex-felon disfranchisement, and the California League of Women Voters, a non-profit California corporation whose purpose is to promote active citizen participation in government. Edmund G. Brown, Jr., Secretary of State of the State of California, a respondent in the original action in the California Supreme Court, has been named a respondent herein by the Attorney General.

[2]As requested by petitioners below, the opinion in *Ramirez v. Brown* is specifically limited to those ex-felons whose terms of incarceration and parole have been completed. 9 Cal.3d at 217, n. 18.

representatives of the Class of all County Clerks and Registrars of Voters.[3] The three County Clerks were Ernest Maggini, County Clerk for the County of Monterey, Ruth Warnken, County Clerk of San Luis Obispo, and Mervin Mattos, Registrar of Voters of Stanislaus County. These three County officials had denied registration to petitioners Lee, Ramirez, and Gill respectively.

3] None of the three respondent County Clerks chose to contest the Petition below. Ernest Maggini and Ruth Warnken separately filed returns to the Alternative Writ issued by the California Supreme Court advising that said respondents thereupon were commencing and continuing to register all ex-felons whose terms of incarceration and parole had expired and who, upon application, demonstrated that they were otherwise fully qualified to vote. *Ramirez v. Brown* at 203. The third County respondent, Mervin Mattos, filed no response to the Petition and made no appearance. Petition, p. 7.

4] Viola N. Richardson, Clerk and Registrar of Voters of Mendocino County, a member of the class of respondents below, petitioned the California Supreme Court for leave to intervene in the original action. Because Mrs. Richardson was a member of the class of County Clerks and Registrars of Voters, the Court allowed her to appear as an individual respondent. The District Attorney of Mendocino County

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[3]Actions against defendants representative of a class may be maintained under California law. California Code of Civil Procedure Section 382. *Mitchell v. Pacific Greyhound Lines*, 33 C.A.2d 53, 91 P.2d 176 (1939).

appeared on behalf of Mrs. Richardson and urged the California Supreme Court to maintain the disfranchisement of all former felons based on the principle of maintaining the "purity of the ballot box". Motion to Intervene below, pages 8-9.

5] The Attorney General of California appeared on behalf of the Secretary of State, Edmund G. Brown, Jr. The Attorney General indicated to the California Supreme Court at oral argument that he represented the Secretary of State and that he also had an "interest" of his own in the case. The transcript of the Attorney General's oral argument appears in the Appendix hereto. The Attorney General stated to the Court that his position was the same as that of the Secretary of State. Appendix pp. i, iv. Both the Secretary of State and the Attorney General agreed with petitioners below that petitioners and their class should not be denied their right to vote as long as they had completed their terms of incarceration and parole. Appendix pp. i-iv. The Attorney General, as he has stated in the Petition herein at page 5, also admitted to the Court in oral argument that the state-wide disparity in the application of California's voting laws was clearly unconstitutional. He stated:

> "I think there's no question you have the geographical denial of equal protection on that ground." (Appendix p. iv).

The Attorney General concluded his oral argument by indicating to the Court that if it was going to limit its decision to restoring the right to vote to the class

of former-felons not presently on parole, he agreed with such a decision. Appendix p. ix.

6] Respondents presented the California Supreme Court with data showing the state-wide geographical disparities in application of the "infamous crime" standard. The Attorney General provided additional examples at oral argument.[4] In reviewing the evidence presented, the California Supreme Court held in a unanimous decision on March 30, 1973, that the disfranchisement of ex-felons who were not then incarcerated or on parole was no longer constitutionally permissible in California.

7] On May 26, 1973, the County Clerk and Registrar of Voters for Mendocino County, Viola N. Richardson, filed a Petition for a Writ of Certiorari from the judgment in *Ramirez v. Brown. (Richardson v. Ramirez,* October Term No. 72-1589). That petition was brought by Viola N. Richardson "individually and as a representative of the class of all other County Clerks and Registrars of Voters" and awaits determination by this Court. Respondents have filed their Brief in Opposition to that Petition.

8] The Attorney General of California, 85 days after the decision in *Ramirez v. Brown,* filed an "Application for Extension of Time in Which to File Petition for Writ of Certiorari" on behalf of "The Peo-

[4]The Attorney General set out two examples of the administrative discretion under *Otsuka v. Hite, supra,* that led to the unequal application of the law. In Los Angeles, statutory rape was a disfranchising crime while ordinary rape was not, and a conviction of possession of marijuana under State law was a disfranchising offense but the same conviction under Federal law was not. Appendix pp. iv-v.

ple of the State of California (a non-party); Ernest Maggini, County Clerk of the County of Monterey; Steve R. Nelson, County Clerk and ex-officio Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of San Luis Obispo County (all of whom declined to appear in the California Supreme Court); individually and as representatives of the class of all other County Clerks and Registrars of Voters of California."[5]

9] Pursuant to that extension order, on August 20, 1973, the Attorney General of California filed this Petition for Writ of Certiorari from the judgment in *Ramirez v. Brown* with two noticeable changes. First, the Secretary of State, the Attorney General's client below, was made a respondent, but more importantly, the Attorney General proposed to the Court that he was no longer petitioning on behalf of the three named individual county registrars but rather on behalf of (a) "The People of the State of California" and (b) the "Class of County Clerks and Registrars of Voters of California."

[5]That application was considered and an order was issued on July 2, 1973, extending time for filing the petition for Writ of Certiorari to and including August 27, 1973.

ARGUMENT

I

NEITHER "THE PEOPLE OF THE STATE OF CALIFORNIA", A NON-PARTY TO THE JUDGMENT BELOW, NOR "THE CLASS OF COUNTY CLERKS AND REGISTRARS OF VOTERS OF CALIFORNIA", WITHOUT AN INDIVIDUAL REPRESENTATIVE, ARE PROPER PARTIES TO PETITION FOR A WRIT OF CERTIORARI.

A.

The Attorney General of the State of California Cannot Invoke the Jurisdiction of This Court on Behalf of a Petitioner That Was Not a Party to the Judgment Below.

California's Attorney General has postured this petition in a most unusual and strained manner. The rules of this Court clearly set forth special provisions for the protection of both state and federal government interests where the government was not a party to a judgment petitioned from. Rule 42(4). The Attorney General, however, has attempted to petition this Court for a writ of certiorari on behalf of a petitioner that was not a party below, "The People of the State of California".

The attempted filing of the petition by the Attorney General on behalf of The People of California was clearly improper. Although Rule 21(4) of this Court allows "all parties" to the proceedings below to be deemed parties in this Court, "The People of the State of California" were not a party to the record and judgment below. *Ramirez v. Brown, supra.* They are therefore not entitled to seek review of the decision in *Ramirez* by way of a petition for writ of certiorari. *In re Leaf Tobacco v. Board of Trade,* 222 U.S. 578 (1911).

Recognizing this error, the Attorney General, on August 29, 1973, stated in a letter to the Court that "The People of the State of California," in fact, had not been a party below, and amended the petition to include *only* the "Class of County Clerks and Registrars of Voters of California" as petitioner.[6]

B.

The "Class of County Clerks and Registrars of Voters of California", Being a "Class" Without a Representative Individual Member is not a Proper Party to This Petition.

The Petitioner is now presented as simply "The Class of County Clerks and Registrars of Voters of California." It is clear under both State law and the Federal Rules of Civil Procedure that the entity of a "class" cannot be a party without being represented by at least one individual member who will represent the class interest. It is not enough that there is an attorney willing to represent a client, there must be in fact a party who seeks his interest and those of his class protected. California Code of Civil Procedure, Section 382, Fed. R. Civ. P. 23.

However, assuming the "class" was entitled to petition for a writ of certiorari without being represented by an individual member, still another fatal procedural defect is present. The "class", as the "petitioner" it is now portrayed to be, did not appear below as a separate party. Petition, page 7. Under such a posture, the "class" herein would thus be a peti-

[6]Letter dated August 29, 1973, to the Honorable Michael Rodak, Jr., Clerk of the Court, from Evelle J. Younger, Attorney General, by George J. Roth, Deputy Attorney General.

tioner who not only failed to raise and preserve the present issues below, but in fact defaulted by not appearing at all.

An established principle of appellate review is that review of a question will be denied to a party failing to raise and preserve that question in the lower court. *United States v. Donnelly's Estate,* 397 U.S. 286 (1970). That rule has been applied to a party who fails to raise a federal question in state court even where a co-party has successfully raised the question. *Puget Sound Power and Light Company v. King County,* 264 U.S. 22 (1924); *Sully v. American National Bank,* 178 U.S. 289 (1900). As this Court stated in *Sully:*

> "However it may be in regard to the rights of parties on appeal in the state court, we think that, in order to be heard in this court, the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that *he has himself* raised the question in the state court which he argues here; and it will not aid him to show that *someone else* has raised it in the state court, while he failed himself to do so." 178 U.S. at 297. (Emphasis added).

Thus, where a co-party may be barred from raising a tardy constitutional challenge, then *a fortiori,* a respondent that fails to appear at all may not later petition for a writ of certiorari. The "Class of County Clerks and Registrars", therefore, either cannot now be heard because it is without an individual representative or alternatively because it failed to contest

the decision below. It is respectfully submitted that the petition should be dismissed as having been filed on behalf of an improper party.

C.

This Petition for Writ of Certiorari Was Not Timely Filed Because the Extension of Time to File the Petition Was Obtained on Behalf of Petitioners Who Were Neither Parties Below Nor Now Before the Court.

The petition now docketed no longer names as petitioners the State of California or the three individuals previously named as representatives of the class of County Clerks and Registrars. Ernest Maggini, Steve R. Nelson, and Ruth Warnken, County Clerks and Registrars of Monterey, Stanislaus and San Luis Obispo Counties, *were* named by the Attorney General in his request for an extension of time in which to file the petition, however. In the California Supreme Court, each named County Clerk had "decided not to contest the issue" and advised the California Supreme Court that they would register all former-felons who were otherwise qualified to vote. *Ramirez* at 203. The three named Clerks had removed themselves as parties below and are not proper parties to a petition for writ of certiorari from that judgment. *In re Leaf Tobacco, supra.* They therefore were not proper parties to the application for extension of time for filing submitted in their names by the Attorney General. Recognizing this error, after having obtained the 60-day extension in their names, the Attorney General did not name them as petitioners. Instead, the petition herein was filed on behalf of "The People of the State

of California" and the "Class of County Clerks and Registrars of Voters." The petition ultimately docketed states that "The real party in interest" is the People of California, whom the Attorney General has since conceded was not a party below and has voluntarily removed from the petition. Petition, page 9.

The deletion of the Attorney General's "real party in interest" *and* the three named individual members of the class means, at least, that the application for extension of time for filing does not apply to the petition now before the Court. As a result the petition was not timely filed. It is respectfully submitted that on that ground alone, this petition should be dismissed.

D.

The Present "Class" May Not Petition For a Writ of Certiorari Because It Has Already Done So In Richardson v. Ramirez.

Assuming that the "Class of County Clerks and Registrars of Voters of California" is a proper petitioner for a Writ of Certiorari, that same petitioner has already pending before this Court a petition for Writ of Certiorari from the same judgment below. In *Richardson v. Ramirez,* October Term No. 72-1589, the County Clerk and Registrar of Voters for the County of Mendocino, Viola N. Richardson, "individually and as a representative of the class of all other County Clerks and Registrars of Voters" petitioned this Court for a Writ of Certiorari from the judgment in *Ramirez v. Brown, supra.* The Attorney General cites no authority to support the maintenance of what is in effect a second and identical petition. No facts are

alleged in this petition to differentiate it from that in No. 72-1589. No allegation is made that there is any difference in the interests of petitioner Richardson and the class she represents and the "petitioner" herein. No reason for believing that the issues were not adequately set forth by petitioner Richardson in No. 72-1589 have been presented in this petition. Indeed, "petitioner" herein cites not one authority not presented by petitioner Richardson.

Moreover, Rule 23(5) of this Court indicates that where "*several* cases are sought to be reviewed on certiorari to the same court that involve *identical* or closely related questions, it shall suffice to file a *single* petition for writ of certiorari covering all the cases." [Emphasis added]. In the present instance there is only *one* case sought to be reviewed, the issues are by definition *identical* as to that case and the two petitions now on file. Clearly, the maintenance of these two separate petitions is contrary to the rules of this Court. It is respectfully submitted that this petition should therefore be dismissed.

E.

A Request to File an Untimely Amicus Curiae Brief Submitted by a Party to a Pending Petition for a Writ of Certiorari Should Not Be Granted.

The Attorney General of California has requested that if his Petition for Writ of Certiorari on behalf of the "Class of County Clerks and Registrars of Voters" is denied, that it then be treated as an amicus curiae brief in support of the Petition for Writ of Certiorari in the case of *Richardson v. Ramirez*, Oc-

tober Term, No. 72-1589.[7] Transforming the Attorney General's certiorari petition into an amicus petition does not cure its defects. The "amicus" is purportedly filed on behalf of "The Class of County Clerks and Registrars," the very same party which has filed the petition in No. 72-1589. Surely a party cannot be both a petitioner and an amicus in the same case. Moreover, the amicus request, insofar as it is purportedly on behalf of "The People of the State of California," filed some five months after the judgment below and over 90 days after the docketing of the case, is not timely filed as required by Rule 42(1). This request should therefore not be granted.

II

IN VIEW OF THE FACTS PRESENTED TO THE COURT BELOW, THE CALIFORNIA SUPREME COURT PROPERLY HELD THAT DISFRANCHISEMENT OF EX-FELONS IN CALIFORNIA IS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

In *Ramirez v. Richardson,* October Term No. 72-1589, respondents set out in eleven printed pages and in an eight page appendix their arguments in opposition to the writ of certiorari and in favor of sustaining the decision of the California Supreme Court. With this Court's permission and indulgence, those arguments are not again set out herein, but are in-

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[7]Letter dated August 29, 1973, to the Honorable Michael Rodak, Jr., Clerk of the Court, from Evelle J. Younger, Attorney General, by George J. Roth, Deputy Attorney General.

corporated by reference. In summary, the relevant points are:

[A] The California Supreme Court, faced with a pattern of unequal application of the vague "infamous crime" standard found in the California Constitution, decided the issue in this case on a series of facts unique to California. A survey conducted by California's Secretary of State in early 1972 showed that the term "infamous crime" was interpreted by each County Registrar on an ad hoc basis, resulting in a hodge-podge of rules and standards. For example, a person convicted of burglary who had been released from prison and parole was registered and permitted to vote if he lived in Alameda, Contra Costa, Fresno, Marin, San Joaquin, Sonoma, and Yuba Counties. He was denied registration if he lived in El Dorado, San Bernardino, and Santa Cruz Counties. Similarly, at least eight counties (Yolo, Sonoma, Santa Clara, San Francisco, San Diego, Sacramento, Contra Costa, and Alameda) would have registered a robbery ex-felon whereas seven others (Siskiyou, Santa Cruz, San Joaquin, San Bernardino, Orange, Monterey and Los Angeles) would not. Twenty-one counties indicated they would register an ex-felon convicted of possession of dangerous drugs, but not use or sale of drugs. Other counties would register the former felon in the case of either possession or use, but not sale of drugs. At least another nine counties registered those convicted of any of the three.

As a result of these disparate practices, the California Supreme Court re-examined the purpose and

meaning of the "infamous crime" restriction. It found that whereas voter fraud was rampant in 1849 when the Constitution was adopted, voting fraud in California today is not a realistic possibility. The last reputed case of vote buying in California occurred in 1908. The Los Angeles County Registrar of Voters has not received a complaint of voter irregularity for the past 41 years. As the California Supreme Court stated:

> "To do so [influence the outcome of an election in California] if possible at all, would require the coordinated skills of a vast squadron of computer technicians." 9 Cal.3d at 214.

Moreover, the Court below found adequate statutory deterrents to fraud in California statutes. The Court stated:

> "The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110-111, §§98-105). Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors." [Footnote omitted]. 9 Cal.3d at 215.

[B] The California Supreme Court's decision does not conflict with opinions rendered in other states having different election law histories and statutory schemes. This Court has repeatedly declined to give weight to petitioner's contention that the equal protection clause does not apply to the restriction of

voting rights. It is clear from the Court's decision in *Reynolds v. Sims,* 377 U.S. 533 (1964); *Carrington v. Rash,* 380 U.S. 89 (1965); *Oregon v. Mitchell,* 400 U.S. 112 (1970); and *Dunn v. Blumstein,* 405 U.S. 330 (1972), that before the right to vote may be restricted, "The purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 405 U.S. at 336. It is even more clear that the Court's phrase "close constitutional scrutiny" does not mean, as the Attorney General has sophistically interpreted it, "utilization of the entire constitution", Petition, page 13. Rather, as recognized by the California Supreme Court, in *Ramirez v. Brown, supra,* it means that under the equal protection clause when a state attempts to restrict the right to vote, it must have a compelling state interest *and* use the least restrictive method available to it. Neither of these requirements have been set forth by the Attorney General to this Court or the Court below. In fact, no rational basis for California's exclusion of respondents and their class from the franchise has ever been presented by the Attorney General.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

MARTIN R. GLICK,
JAMES M. MATTESICH,
DAVID KIRKPATRICK,
LUCY KELLY MCCABE,
GENE LIVINGSTON,
California Rural Legal Assistance,
BURTON D. FRETZ,
Migrant Legal Action Program,
Attorneys for Respondents.

DONALD G. GREEN,
SARA E. GREEN,
League of Women Voters
Education Fund,
Of Counsel.

October 1973.

(Appendix Follows)

Appendix

In the Supreme Court of the
State of California

Abran Ramirez, etc.,
Petitioners,
vs.
Edmund G. Brown, Jr., Secretary of State of the State of California, et al.,
Respondents.

HEARING ON PETITION FOR WRIT OF MANDATE

Monday, February 5, 1973

For Petitioners:
Burton D. Fretz, Esq., et al.

For Respondents:
George J. Roth, Esq.,
Deputy Attorney General

Mr. Roth: May it please the Court I represent the Secretary of State in this matter and it's an unusual case because of the nature of the case the Attorney General has an interest in it. However, as indicated by our pleadings our interests are very close together. The Attorney General is particularly careful and

wants to point out to the Court the difference in the pleadings and the Secretary of State has responded in that matter to exclude prisoners from this State who are serving terms or who are on parole. The petitioners have excluded those people from their pleadings and it may be that that is the subject of another lawsuit. We feel very strongly that based on the pleadings in this case at this time there's nothing before the Court relating to prisoners in prison or on parole.

The Court: Mr. Roth that would mean that you would say that the first alternative offered by the Petitioner was one we shouldn't consider then.

Mr. Roth: Well——

The Court: Which he included in his class——

Mr. Roth: Yes. By his pleadings I don't see he can get to that alternative

The Court: However that wouldn't affect his second alternative as I understand it, which would be those that were under conviction, incarcerated or on parole would be——

Mr. Roth: Well, I believe he excludes those. And basically we start with the idea that prisoners in prison and on parole are put there for punishment purposes, but they may be for rehabilitation or punishment, but we start with the idea that somebody is sent to prison as punishment for a crime, hopefully they'll be rehabilitated and during this period one of the punishments is the deprivation of civil rights. We feel very strongly that the State has a compelling interest and also a reasonable relationship to the end to

be achieved. We think we meet all the tests insofar as people in prison or on parole are concerned.

Mr. Roth: We're not talking about people in county jails waiting to be sentenced or serving misdemeanor sentences. Those people can vote. They vote right now, as far as we know. It it's called to our attention, we advise people that prisoners in county jails have a right to vote.

The Court: Mr. Roth, what about the person who is convicted in the trial court and has the matter on appeal? Would he be excluded or not?

Mr. Roth: It's a question of where do you have a judgment? If he's in prison I believe that you have to exclude him, Your Honor, as far as the punishment. He's still serving sentence—it's part of his sentence.

The Court: I'm talking about the man who hasn't gone there.

Mr. Roth: Well, still until he goes to prison I think you have a different problem. Uh——

The Court: It's hard to define, Counsel.

Mr. Roth: Very hard, Your Honor.

The Court: Because frequently, as you well know, the county jails are filled with individuals who have been convicted of felonies and who as a condition of probation may be serving time on the county level.

Mr. Roth: That's true. If it's probation we're talking about, then we feel that that person can vote.

The Court: Now, even though he has been convicted of what at one time might have been thought to be an infamous crime——

Mr. Roth: Well——

The Court: ——a felony, of a certain type.

Mr. Roth: Let me put it this way, Your Honor. That if—the Attorney General, and that means Secretary of State agree in this principle; They agree with the petitioners to this extent. That if the person has been in prison, has served his term in prison and has completed his parole, that possibly except for election code felonies, and really they're de minimus as I understand it—there hasn't been one in many, many years that we know of—but at any rate, that the people who are finished with the particular sentence altogether, that if they should vote is a matter for the Legislature to decide. That's our position. That the Secretary of State's position. The big problem we see here was to try and define in the case the justiciable issue before this Court when we framed our pleadings, because we, I guess, came up with almost an amicus brief that's really asking the Court for declaratory relief, to tell us and to tell everybody in the State what infamous crime means.

The Court: I assume that's because each county has interpreted it differently.

Mr. Roth: I think there's no question that you have the geographical denial of equal protection on that ground. I think we have to admit that. Just based on what the factual situation is at the moment, and it's an unfortunate situation when you get a county, Los Angeles for example, I believe it is, says that somebody who commits statutory rape, they can't vote and somebody commits rape they can, and I suppose the theory is that statutory rape there's some

chicanery or deceit connected with it with a young girl and I talked to the County Counsel's office and I had to write an opinion, the Court's probably familiar with it, it's in 53 Cal. App., it's on the Otsuka case, and frankly I read Otsuka I guess 27 times and I rewrote the opinion 13 times to try and figure out what to say. But, I talked to the County Counsel's office at Los Angeles who has done more research on it than anybody, and I said "How do you come to this conclusion, what is meant by an infamous crime? And they said, well, we feel somebody is charged with possession of marjuana, under the State law, that that's an infamous crime, but if it's under the Federal law it's a tax case and it's really not an infamous crime it's—— (Laughter)

I said, "Well, what do you mean?" And the attorney said to me, well, he said—I said don't you realize as a practical matter when somebody gets sent to Federal Penitentiary on a marijuana deal it a big deal it's not a little deal? And he said, I know, but we have to have some distinction, and I think the distinction they make was just—to me it was too legalistic.

The Court: In view of the State's inability to define an infamous crime, how can it show a compelling interest that those persons allegedly convicted of it should be kept from voting?

Mr. Roth: I——

The Court: In other words, the burden lies with the State, doesn't it?

Mr. Roth: Your Honor, I think the problem is this: That you said in view of the State's inability to define the crime, and I think the problem is that

the crime has not yet been defined. There is inability to define it and whether this Court does it or the Legislature does it, somebody should do it, and I think it can be done and possibly, and I say this with reservations because I'm not sure—I've read the Federal Cases and I've read many of the State cases—and I suppose in certain instances the State may be able to show a compelling State interest in a rational means for the end, if it's defined.

The Court: Of course the Legislature has now had seven years in which to do it.

Mr. Roth: Well——

The Court: Since Otsuka——

Mr. Roth: Well, now—that's true, Your Honor, however they now have the Constitutional mandate to do it, because they didn't have that before. All they had was this Court's suggestions——

The Court: Do you find justice, do you find some significance in the Constitutional change?

Mr. Roth: I think so, Your Honor, very much.

The Court: What significance?

Mr. Roth: Number one, the constitutional change took the word "ever" out which under the old constitution meant, as I read it, that once somebody was convicted of an infamous crime, for ever after they would be disenfranchised unless they in effect has a pardon from the Governor. You pointed out in Otsuka that if they went through a 350 Election Code, 350 rehabilitation proceeding to prove their rehabilitation they could vote. That modified the law somewhat. But it still said forever. That was taken out of the constitution and the constitution now specifi-

cally says the Legislature shall enact laws to or in effect enabling legislating to carry out this policy and I think that the Legislature has this mandate. The Court may not want to wait for the Legislature to do it.

The Court: Well, are you suggesting then that any statutes on the books prior to the constitutional amendment are invalid because not re-enacted?

Mr. Roth: No, no. I believe that what's on the books is enabling legislation. But when you look at the statutes that talk about striking votes for infamous crimes, it's a problem. It's still there, we still have the problem.

The Court: I find it difficult to find any significance in the omission of the word "ever."

Mr. Roth: Well to me that's the most important part of the change, Your Honor.

The Court: It seems to be a matter of semantics. The original constitution provision didn't have the word in and it was subsequently added, and now it's omitted. It looks to me like it's just a semantical——

Mr. Roth: Well, it's hard to tell and it's really to impute the knowledge of what the change meant to the voters because it was done in the Legislature and really this is not legislation but the people voting, it's different and so whether or not we can impute the change to the desire of the people to make the change is questionable, I agree. But you have problems—all we're asking is help from the Court so the people know what infamous crime is.

I'd like to get back again, if I may, to the question of the prisoners in prison or on parole. Because

really that is what interests us, it interests the Secretary of State, it interests the Attorney General more. Now I have a client and I'm his lawyer, and I guess there's a fine line in the lawyer-client relationship that I hopefully trying very delicately but honestly, and within the framework of the Code of Ethics. And the Attorney General is very much interested in being certain that the prisoners in prison and on parole do not vote. There's a tremendous amount of problems. What I'm alluding to, the City of Folsom in order, in the newspapers, get a tax advantage of some time as I understand it, annexed Folsom Prison and it may backfire on them if the prisoners are allowed to vote. But here's what happened—(Laughter)

If the prisoners in Folsom Prison are permitted to vote, then they vote for the City Council of the City of Folsom they will in effect control who the police chief is and under our system of administration of justice in California, the local agencies are the ones who investigate the crimes in the prisons. When a crime occurs in San Quentin the District Attorney's office over in Santa Rosa I guess it is goes in and investigates it. The Sheriff investigates it. And if you had prisoners in San Quentin Prison voting and saying that they're residents of that County they could elect their own sheriff and their own District Attorney, it would be a great thing. You have administrative problems.

The Court: Are they counted in the population in the census polls?

Mr. Roth: I don't think San Quentin is at the moment, but you never know when somebody is going to annex them, Your Honor. They did it in Folsom——

The Court: Well, if they get the benefits why shouldn't they have the detriments?

(Laughter)

Mr. Roth: But the—there's other problems. There's many administrative problems that I can see. For example supposing that this Court was to say that prisoners in prison could exercise their franchise in any election in this State and somebody said—they might say, well they wouldn't have to set up polling booths, they could vote by absentee ballot. Well, I could foresee immediately that question of denial of equal protection, because they would say well the League of Women Voters has no right to come in and present their candidates night in our prison and the candidates can't come through and shake hands with—we don't get to meet the candidates, we don't have the same knowledge that the rest of the voting population has.

The Court: Mr. Roth, isn't this really a straw man that you're building up here? The members—the Petitioners here are not prisoners and the class of which they are members do not include prisoners or parolees, they're all out, they served their time, one of them 18 years ago——

Mr. Roth: Your Honor, that's the greatest thing I've heard today. Because as long as the Court feels that way, I'll stop.

The Court: Well, I'm not thinking for any of my colleagues——

Mr. Roth: If the Court has any further questions.

The Court: I think not. Thank you.

Mr. Roth: Thank you, Your Honor.